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December 17, 2003

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DEC 17 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
The Portals II
445 12th Street, S.W.
Washington, D.C. 20554

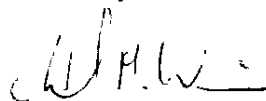
Re MB Docket No. 02-76
RM-10405
RM-10499

Dear Madame

Enclosed for filing are an original and four copies of a Consolidated Response to Petitions for Reconsideration by Commonwealth Broadcasting, L.L.C. and Sinclair TeleCable, Inc., dba Sinclair Communications

Should there be any questions, please contact the undersigned counsel.

Sincerely,



Howard M. Weiss

HMW/et
Enclosure

cc All Parties on Certificate of Service

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ORIGINAL

**Before the
Federal Communications Commission
Washington, DC 20554**

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DEC 17 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments,)

FM Broadcast Stations)

(Crisfield, Maryland, Belle Haven,)

Nassawadox, Exmore and Poquoson,)

Virginia))

MM Docket No. 02-141

RM-10428

To: Assistant Chief, Audio Division
Media Bureau

**CONSOLIDATED RESPONSE
TO
PETITIONS FOR RECONSIDERATION**

Commonwealth Broadcasting, L L C , and Sinclair Telecable, Inc , dba Sinclair Communications (collectively "Sinclair"), pursuant to Section 1.429 of the rules, hereby respond to the Petition for Reconsideration of the action taken by the Assistant Chief, Audio Services Division ("ASD"), in the above-captioned proceeding, on September 29, 2003 (the "Decision"), filed by Bay Broadcasting, Inc. ("Bay") and Tidewater Communications, LLC ("Tidewater") on November 17, 2003. Notice of the petitions was placed in the Federal Register on December 2, 2003. Accordingly, pursuant to Section 1.429(f), this Response is timely filed. In support hereof the following is stated.

I. Sinclair Takes No Position On The Bay Petition.

1 Bay, the initial petitioner for rulemaking, seeks reconsideration of the ASD's rejection of its proposal. The ASD held that Bay's proposed facility at Crisfield, Maryland would not place the requisite signal over its community of license. Sinclair takes no position on Bay's arguments in support of reversal. However, as

Sinclair stated in a pleading filed October 1, 2002, Sinclair has no objection to the allotment of either Channel 252A or 252B1, in lieu of Channel 250B1, at Belle Haven, Virginia. Should the Commission find Bay's proposal otherwise acceptable on reconsideration, this alternate channel would facilitate grant of both Bay's proposal and Sinclair's Counterproposal.

II. Tidewater's Petition Repeats Arguments Previously Considered And Rejected, And Therefore Does Not Warrant Reconsideration Of The Decision.

2 The Decision dealt carefully and in depth with each of Tidewater's arguments raised in several pleadings, and soundly rejected them. Specifically, the Decision held that (1) Belle Haven, Virginia is clearly entitled to "community" status under Section 307(b) of the Communications Act; (2) Sinclair's proposed transmitter site for the Poquoson, Virginia channel is suitable; (3) Poquoson is entitled to a first local transmission service credit in spite of its location within the Norfolk, Virginia Urbanized Area; and (4) the reallocation of Station WROX-FM from Cape Charles to Exmore, Virginia does not leave Cape Charles unserved because non-commercial Station WAZP(FM), licensed to the community, would continue to provide service thereto

3 These holdings are supported by thorough factual analysis, technical study, and examination of applicable Commission policies and case precedents implementing the policies. Each of Tidewater's arguments is addressed, including its oft-repeated contention that Sinclair was improperly allowed untimely to supplement its case "This is all that [indeed much more than] the APA requires." City of Waukesha v. EPA, 320 F.3rd 228, 257-258 (D.C. Cir. 2003). See also Sprint Corporation v. FCC, 331 F.3rd 952, 960 (D.C. Cir. 2003)

4. "To be successful, a petition for reconsideration must rely on new facts, changed circumstances, or material errors or omissions in the underlying opinion. [Citations omitted.] A petition which simply reiterates arguments previously considered and rejected will be denied. [Citation omitted.]" Bennett Gilbert Gaines, 8 FCC Rcd 3986 (Rev Bd. 1993). See also, Eagle Broadcasting Co. v. FCC, 514 F2d 852 (D.C. Cir 1975); GTE Corporation, 2003 FCC Lexis 6625, 6627 (Chief Enforcement Bureau 2003), In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Winslow, Camp Verde, Mayer and Sun City West, Arizona), 16 FCC Rcd 9551 (Chief, Allocations Branch 2001), In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Pelham and Meigs, Georgia), 2003 FCC Lexis 6419 (Assistant Chief, Audio Division, 2003)

5. Tidewater's Petition fails to meet these demanding standards. Instead, it flies in their face--it is essentially a regurgitation of Tidewater's pre-Decision pleadings. Indeed, a cursory examination of Tidewater's earlier pleadings reveals that argument headings, citations and factual showings in the Petition are simply carried over without even word edits or any attempt at "touch up" from prior pleadings. Compare, e.g., the argument headings in Tidewater's July 16, 2003, Reply Comments to those in the Petition.

6. In light of the above, summary denial would be appropriate. Nevertheless, in an abundance of caution, Sinclair briefly responds on the merits below.

III. The Commission Properly Held, Applying The Latest And Most Accurate Technology, That Sinclair's Poquoson Site was Suitable.

7 The ASD reviewed Tidewater's attack on the suitability of the reference site for the proposed Poquoson channel. The agency was presented with a conflict between, on the one hand, a 1983 topographic map purportedly demonstrating that the coordinates were offshore by the tiniest of margins and, on the other hand, a computerized mapping service and a GPS measurement (backed up by photographs) purportedly demonstrating that the proffered site is on land. Performing its function as the expert agency charged with reaching accurate factual determinations, the ASD turned to "detailed maps and other relevant material from the United States Geological Survey (USGS) [the expert agency on maps and the agency that presumably prepared the map upon which Tidewater relies] internet site (www.usgs.gov)" (At ¶7.) Utilizing a topographic map and a navigational photo of the area designated as Sinclair's transmitter site, the ASD concluded that "the referenced site is on dry land." (*Id.*)

8. Tidewater is understandably unhappy with this conclusion. But its arguments against the conclusion are unavailing. Petitioner states that its lawyer and engineer "tried to duplicate the ASD's feat; however, both were unable to do so." (At 4.) The map on USGS's site was not "refined" enough for Tidewater and the "coordinate readout on the website has not been shown to be accurate." (*Id.* At 4-5)

9 Sinclair's experience was to the contrary. Its lawyer and engineer both went to the indicated website and used the links to USGS partner sites designated therein to view a clear and detailed map of the area where the Poquoson reference points are located--and located on land. Specifically, Sinclair's counsel reviewed MapTech Map Server, which "allows access to the largest online database of NOAA

digital charts and USGS maps available in the world.”¹ At the MapTech site, Sinclair’s counsel viewed, and zoomed in on for better resolution, a detailed map which, by use of the cursor, identified as on land the site at 37°12’30”N, 76°25’06”W.^{2 3}

10. In light of the foregoing, again not surprisingly, Tidewater attacks the use of the USGS website on grounds independent of its utility. Petitioner cites Section 73.312 of the rules and a series of cases and procedural rulings from the 1980’s wherein the Commission ordered reliance on USGS topographic maps (At 5.) But Tidewater ignores that the USGS website and its partners’ sites are merely the most technologically advanced and latest USGS version of their 1980’s paper predecessors. All are USGS maps. And, even if applicable to an allocations issue of this nature, Section 73.312(a) expressly mandates use of the USGS or other governmental maps, “whichever is the latest.”

11. Stated another way, contrary to Petitioner’s assertion, Tidewater’s map is not “the gold standard.” The Commission has the right--indeed, the obligation--to update its map finding resources to keep pace with technology. The fact that the Commission relied upon 1980’s topographical maps in the 1980’s and 1990’s does not prevent it from utilizing 2003 computerized maps in 2003. It would be abdicating its responsibilities to do otherwise.

12. In any event, and perhaps most importantly, the debate here over a one second locational difference is much ado about nothing. The ASD adopted Sinclair’s suggestion that changing the longitude reference here by two seconds results

¹ <http://geography.usgs.gov/partners/viewonline.html>

² <http://mapserver.maptech.com/homepage/index.ctm?lat=37.208248&lon=76.418263&sc>

³ Because the site at issue is interactive it is not possible to reproduce it effectively on paper. But, using the foregoing internet address, there is no doubt but that Sinclair’s coordinates are on land.

in a transmitter site that is farther from the water as well as fully-spaced and otherwise compliant with the FCC's rules (At ¶10) Such a ministerial change is fully within the ASD's discretion and consistent with prior Commission case law and rules. (*Id.* and footnote 16)

13 The Petition weakly challenges this prudent exercise of discretion as without "legal support" and a "denial of due process." (At 6.) But it cites no contradictory authority. Tidewater's desperate effort to create a mountain out of a molehill by elevating form over substance is ultimately unavailing.⁴

IV. Belle Haven Is Entitled To Community Status.

14. The Commission rejected Tidewater's argument that Commission case law involving population groupings not incorporated or recognized by the U.S. Census as a city was controlling here. Since Belle Haven has both of these characteristics, a rebuttable presumption of 307(b) community status was appropriately applied in the instant case Accordingly, the cases cited by Tidewater, Gretna, Quincy and Tallahassee, Florida, 6 FCC Rcd 663 (1991), Crestview and Westbay, Florida, 7 FCC Rcd 3059 (1993), and Pike Road and Ramer, Alabama, 10 FCC Rcd 10347 (1995)⁵ are inapposite

15. Further, the Commission had, in any event, ample basis to conclude that Belle Haven is a "distinct geographic population grouping." (At ¶16.)⁶

⁴ The ASD has adjusted site coordinates challenged as not on land time and again, modifying them by distances of many miles See cases cited in Decision at fn 16.

⁵ Tidewater's desperate attempt to apply the last of these precedents by asserting that "[t]here was some question as to incorporation" (at 9) with regard to Ramer, Alabama, is belied by the decision The Ramer petitioner claimed that the community was "incorporated," but the Commission observed that "[a]ccording to the 1990 U S Census, Ramer is not listed as an incorporated entity or a Census Designated Place " 10 FCC Rcd at 10349

⁶ This standard of course is not nearly as high as the standard for evaluating whether a community is entitled to a first local service preference under Faye and Richard Tuck, 3 FCC Rcd 5374 (1988)

While part-time, Belle Haven's Mayor and five-person Council are functioning, and meet regularly. The Town has a Recorder, a Town Constable, an election process, town ordinances and resolutions. The Town provides garbage collection and street lights. There are distinct Belle Haven businesses and community and civic organizations. Declarations from the Mayor and a Town Councilman supported these allegations, while Tidewater's case to the contrary was premised on a superficial, hearsay statement from one of Petitioner's managers, not worthy of consideration. Sinclair also provided a series of citations for the key legal principle here--the Commission will allot channels even to the smallest communities, where the incorporation/Census recognition presumption is applicable. See cases cited at page 16 of Counterproponents' Response, filed August 14, 2002.

16. The Petition again attacks the ASD's consideration of Sinclair's supplement to the Counterproposal. But Petitioner offers no persuasive rebuttal to the ASD's conclusion that the cases enumerating the principle that counterproposals must be technically correct and substantially complete when filed did not involve mere factual supplementation of an otherwise technically correct and substantially complete counterproposal. In both of the cases cited at page 6 of the Petition, even the proponents' attempts to amend their proposals were materially changed from the original proposal and/or fatally flawed by city-grade coverage or short-spacing deficiencies.

17 That is not the case here. In the instant case, the ASD had discretion under Section 1429(b)(3) to consider the facts offered to supplement a technically acceptable proposal⁷

V. Poquoson Is Entitled To Its Own Station.

18 Here again, Tidewater repeats the same factual errors and legal mischaracterization offered previously in support of its contention that Poquoson is merely an appendage of the Norfolk Urbanized Area.

19. Tidewater relies heavily on what it claims is an analogous precedent in Fairfield and Norwood, Ohio, 7 FCC Rcd 2371 (1992). The ASD properly ignored this ruling⁸ because the decision there provided little factual basis for a finding that Norwood was independent and is therefore entirely distinguishable from the instant case. Poquoson is not "surrounded" by the Norfolk Urbanized Area, much less Norfolk, as Norwood was by Cincinnati. Poquoson is not contiguous with Norfolk, Portsmouth, Chesapeake or Virginia Beach.⁹ It borders Hampton, but is "surrounded" in any sense only by York County (not part of the Urbanized Area) and water. Poquoson seceded from York County by vote of its citizens in 1952.

20 While Norwood had only one bank, a post office and a zip code according to the Fairfield decision, Poquoson has a comprehensive governmental structure housed in a new municipal complex, a separate school system, substantial police and fire departments, a large library system and hundreds of businesses and

⁷ Tidewater is right about the final argument it offers on page 10. It is rank speculation. It should not only be "derided," it should be dismissed. The ASD does not act as a guarantor of a potential channel's prospects of economic survival.

⁸ Tidewater cites no authority for its apparent assumption that the ASD was required to discuss and distinguish every legal citation in the Petition.

⁹ It is in fact 9.5 miles from Norfolk and 14 miles from Virginia Beach.

churches. Further, the FCC concluded that Norwood and Cincinnati had a direct interdependent relationship. As the ASD (and prior precedent) observed, "the Norfolk Urbanized Area is a peculiar urbanized area in that there is not one identifiably dominant community within the Urbanized Area." Elizabeth City, North Carolina, and Chesapeake, Virginia, 9 FCC Rcd 3586, 3588 (Mass Media Bureau 1994). See also Bon Air, Virginia, 11 FCC Rcd 5758 (Mass Media Bureau 1996).¹⁰

21 Poquoson is one of only two cities in the Commonwealth of Virginia without a radio station and is the largest without a local radio outlet. It manifestly is entitled to one and the ASD properly so held.

VI. Non-Commercial FM Service Is Recognized As Equivalent For 307(b) Purposes and the Counterproposal Will Therefore Not Deprive Cape Charles of Cognizable Service

22 Never daunted by controlling authority, Tidewater once again urges in the Petition that Sinclair's proposed reallocation of WROX "would eliminate the only commercial station in Cape Charles." (At 13.) (Emphasis added.) When presented with this point previously, the ASD's response was, correctly, "So What?" (At ¶19.) As the Decision accurately summarized the law:

"Non-commercial stations are relevant for purposes of analyzing local service to community under Section 307(b) of the Act, and all non-commercial stations have an obligation to serve significant programming needs of their communities." [Citations omitted.]

23. This has been black letter allocations law since 1990, when the Commission adopted the modification of license rule. Modification to Specify New Community of License, 68 RR2d 644, 650 (1990). So long as the non-commercial outlet places a city-grade signal over its city of license, as WAZP does over Cape

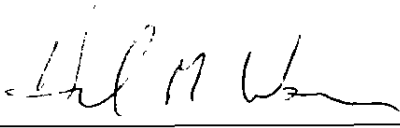
¹⁰ Nor, contrary to Tidewater's wishful thinking, is Poquoson reminiscent in any sense of Del Rey Oaks, California, a town of 1,661 persons "directly between and contiguous with" two Urbanized Area central cities. Greenfield and Del Rey Oaks, California, 11 FCC Rcd 12681, 12683 (1996).

Charles here. Tidewater is blowing smoke (again). Once again on this issue, a decision in Sinclair's favor is mandated by the facts and the law.¹¹

VII. Conclusion.

24 The Commission has scarce and overextended resources available for the important task of allotting FM and television channels. In order to conserve them for resolution of cases involving legitimate issues, repetitious and captious objections like Tidewater's should be unceremoniously denied.

Respectfully submitted,

By: 

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Dated: December 17, 2003

¹¹ The authorities cited by Petitioner (at page 14) are of course utterly inapposite. Neither involved the critical Priority 3 of the FM allocations scheme--first local transmission service. Rather, they explicitly involved reallocation from one well-served community to another. Sumter, Orangeburg, and Columbia, South Carolina, 11 FCC Rcd 6376, 6377 (1996)

CERTIFICATE OF SERVICE

I, Evelyn Thompson, a secretary at Fletcher, Heald & Hildreth PLC, hereby certify that a true and correct copy of the foregoing "Consolidated Response to Petitions for Reconsideration" was sent on this 17th day of December, 2003, via First-Class United States mail, postage pre-paid, to the following:

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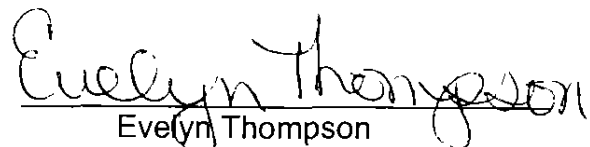
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